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SENATE

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AMENDING THE HART-SCOTT-RODINO ANTITRUST IMPROVEMENTS ACT OF 1976

MAY 14 (legislative day, APRIL 18), 1990.—Ordered to be printed

Mr. BIDEN, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 995]

The Committee on the Judiciary, to which was referred the bill (S. 995) to amend the Sherman Act and the Clayton Act, as amended, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

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I. PURPOSE OF BILL

S. 995 amends the Sherman Act to increase the maximum fines for criminal violations of section 1 of the act. The bill would make no change with respect to the penalty of imprisonment under the Sherman Act.

Under current law, the maximum fine that may be imposed upon conviction of each count of an indictment under section 1 of the Sherman Act is $1 million for corporations and $100,000 for individual offenders. S. 995 would increase the criminal fines to $10

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million for corporations and $250,000 for individuals. The committee considers the current criminal fine provisions, which have been at the current levels for over 15 years, to be inadequate to deter price-fixing and other restraints on trade that violate section 1 of the Sherman Act. It is the intention of the committee to put potential violators on notice that price-fixing and other hard-core violations of the antitrust laws are serious infractions that warrant stiff penalties.

S. 995 contains several amendments to the procedural requirements of the Clayton Act, particularly to the premerger notification requirements contained in the Clayton Act. The Hart-Scott-Rodino Antitrust Improvements Act was enacted in 1976 to enhance enforcement of the antitrust laws. Section 201 of that act added section 7A to the Clayton Act, establishing a premerger notification system. Under that system, proposed mergers valued over specified monetary amounts must be reported to the U.S. Department of Justice and the Federal Trade Commission (FTC) so that they may be reviewed for compliance with the antitrust laws before they are consummated.

The premerger notification mechanism was developed to advise antitrust authorities of proposed mergers involving very large firms and to facilitate enjoining illegal mergers before their consummation. The Senate report found that:

> Presently, the Government can stop few illegal mergers before they take place. Once a merger is consummated, the average case takes 5 to 6 years to resolve, during which time the acquiring entity retains the illegal profits and other fruits of the transaction. Securing adequate relief after the assets, management, and technology of the two merged firms have been together for that 5- to 6-year period is virtually impossible. As a result, the original state of competition is rarely restored upon ultimate disposition of the judicial proceeding.

S. Rep. No. 803, 94th Cong., 2d sess. 61 (1976).

Giving the antitrust enforcement agencies the opportunity to review proposed mergers and, if necessary, enjoin their consummation if they would violate the antitrust laws, has helped alleviate the problem of "unscrambling the eggs" once a merger has occurred.

The premerger notification system created by the Hart-Scott-Rodino Antitrust Improvements Act is basically sound. There are several facets of the process that require improvement, however, which S. 995 addresses.

The FTC, in conjunction with the Antitrust Division of the U.S. Department of Justice, has developed a rather complex set of regulations and informal advisory opinions to implement the premerger notification system. It is necessary for the FTC and the Antitrust Division to have the flexibility to apply section 7A, in accordance with its purposes, to the different sets of facts which arise. In general, both agencies have done a good job.

The agencies have failed, however, to solve a glaring problem in the way the act has been applied to acquisitions by partnership. Under current agency rules and interpretations, a partnership

need not report a proposed acquisition if the partnership itself does not possess assets, in addition to the cash it has on hand to make the acquisition, that meet the monetary thresholds of the act. Thus, large firms and wealthy individuals may avoid notifying the Government about a proposed merger by forming an underfinanced partnership to make the acquisition.

The attempted takeovers of Phillips Petroleum and Shamrock Oil Co. by T. Boone Pickens were structured as partnership acquisitions. Likewise, Sir James Goldsmith formed a partnership in his attempted takeover of Goodyear Tire & Rubber Co. & Rubber Co.

It is unacceptable for this loophole in the premerger notification system to continue to exist. While the FTC and the Department of Justice have been aware of the partnership loophole since at least September 1985, the agencies have not promulgated regulations that adequately close it. Notice and comment rulemaking was commenced by the FTC in September 1985, addressing, among other things, the partnership loophole. The proposal to close the partnership loophole contained in that rulemaking was abandoned by the FTC without taking effect.

The FTC took no further public action to close the partnership loophole until March 6, 1987, when the FTC authorized the commencement of notice and comment rulemaking on a second proposed regulation to close the loophole. On May 29, 1987, the FTC adopted a new definition of the term "control," to provide that persons who own 50 percent or more of partnerships or other entities that do not have voting securities, will be deemed to control such entities. 16 CFR 801.1(6). However, the new definition of control is easily evaded, for example, by utilizing three partners with equal one-third interests who, therefore, are not deemed to control the partnership.

Recognizing the inadequacy of the 1987 amendment, the FTC initiated a third rulemaking procedure on February 24, 1989, by seeking comments on five proposals to close the partnership loophole. The comment period expired on April 25, 1989, and a year has passed without any action on the proposed rulemaking. At the time of the committee action on S. 995, the FTC has yet to either notice a proposed rule from its five proposed options or enact an adequate final rule, nearly 5 years after first attempting to close the loophole.

It may not be possible to close the loophole entirely since an enterprising lawyer might be able to get around the requirements of any provision. However, the current rules may be encouraging the use of partnerships to affectuate mergers and thereby evade review. In cases where a combination raises antitrust considerations, the reporting requirements should ensure premerger review without offering opportunities to circumvent the requirements based on the way the combination is designed. S. 995 accomplishes that task.

If the Hart-Scott-Rodino premerger reporting system is to function efficiently, the antitrust agencies must have enough time to conduct a thorough review of the proposed merger. The committee has concluded that more time should be provided for premerger review in certain situations.

In the area of civil penalties, it is roundly agreed that the current daily penalties for violations of the Hart-Scott-Rodino notification requirements are inadequate to deter some violations that result from a failure to file notice with the enforcement agencies. As explained by Assistant Attorney General Rill:

> Persons considering acquisitions may calculate that the profits they expect to make by not making a HSR filing may exceed the maximum penalty that could be imposed if they were found to have violated premerger notification requirements. For example, a person hoping to buy publicly traded stock secretly and cheaply may profit substantially by not making a HSR filing because the HSR rules require prior notice to the issuer whose stock would be acquired, and such notice could substantially increase the price that would have to be paid for the stock.

See Testimony of James F. Rill, Assistant Attorney General, Antitrust Division, Department of Justice, before the Committee on the Judiciary, July 25, 1989. Increasing the level of penalties would deter the type of filing violation whereby an investor fails to file because the likelihood and magnitude of any potential fine is viewed simply as a cost of doing business.

Finally, S. 995 would streamline enforcement of HSR reporting violations by authorizing the FTC to seek civil penalties in its own action in Federal court.

II. History of Legislation

S. 995 was introduced by Senators Metzenbaum and Thurmond on May 16, 1989. A hearing on the bill was held on July 25, 1989. On March 22, 1990, with a quorum present, by voice vote, the Committee on the Judiciary unanimously ordered the bill favorably reported. Senator Kohl was added as a cosponsor to the bill as amended by the committee.

III. Discussion

A. SHERMAN ACT AMENDMENTS

The new level of criminal fines contained in S. 995 for violations of section 1 of the Sherman Act would be the fourth increase since the Sherman Act was enacted in 1890. The original fine was $5,000 for violations of section 1, 2, or 3, in addition to imprisonment of up to 1 year. Congress did not act to increase penalties for antitrust violations until 1955, when criminal fines were increased from $5,000 to $50,000. In 1974, as part of a broader measure known as the Antitrust Procedures and Penalties Act of 1974, Congress once again increased fines from $50,000 to $1 million for corporations and from $50,000 to $100,000 for individuals.

Although the Sherman Act penalties have not been amended specifically since 1974, the maximum fines for individuals convicted of antitrust violations have been increased by other generally applicable legislation. The Criminal Fine Enforcement Act of 1984 and the Sentencing Reform Act of 1984, as amended by the Criminal Fines Act of 1987, raised fines for all Federal crimes. These statutes increased criminal antitrust fines for individuals from $100,000 to $250,000. In addition, these statutes provide for an "al-

ternative" maximum fine for both corporate and individual offenders of twice the gross pecuniary gain or loss resulting from the violation, unless such a fine would unduly burden or extend the sentencing process.

The committee believes that increasing the maximum fines for criminal violations of section 1 is necessary and appropriate to deter the most flagrant and abusive forms of antitrust crimes. Despite efforts by the Department of Justice to improve its criminal antitrust enforcement record, this emphasis has done little to stem the tide of illegal price fixing, procurement fraud, and bid rigging conspiracies. Particularly with respect to corporate offenders, fine levels are simply too low to deter effectively antitrust conspiracies, and courts have been reluctant to impose maximum fines, even for willful violations. The tenfold increase proposed in S. 995 would send a signal to businesses and courts that penalties imposed should be higher in order to improve compliance with the antitrust laws.

B. HART-SCOTT-RODINO AMENDMENTS

1. Partnership loophole

The premerger notification scheme contained in section 7A of the Clayton Act requires parties that intend to merge to report their proposed merger to the Department of Justice and the FTC if:

(1) either the acquiring party or the acquired party is engaged in commerce or an activity affecting commerce;

(2) either party has annual net sales or total assets of $100 million or more, and the other party has $10 million or more in annual net sales or total assets; and

(3) the acquiring party would hold 15 percent or more of the voting securities or assets of the acquired party, or more than $15 million worth of its voting securities and assets after the acquisition.

Generally, a party to a proposed merger determines whether it possesses the necessary assets to meet the threshold requirements of section 7A by adding its assets to:

(1) the assets of the entity which controls it, and

(2) the assets of any entity controlled by the entity which controls it.

Partnerships are treated differently, however. Under current law, FTC regulations and FTC informal staff opinions, a partnership formed for the purpose of making an acquisition that has no partner that owns 50 percent or more of the partnership, would count only its own assets minus the cash equivalent assets it will use to make the acquisition.[1] The assets of the partners themselves are not counted for purposes of making the determination.

This rule enables large companies and wealthy individuals to form partnerships to avoid filing notice of their proposed mergers with Federal antitrust authorities.

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[1] There are two qualifications to this general formula. First, it applies only to the first acquisition of a newly formed partnership. The assets counted if the partnership were to make a second acquisition would include the holdings acquired as a result of the first acquisition. Second, if the partnership has prepared regular financial statements, it must refer to those statements in determining its size under section 7A.

Testimony received by the committee was unanimous in the view that the partnership loophole exists and can be used to avoid giving notice to the enforcement agencies in advance of an acquisition. While the committee is willing to assume that the FTC and the Department of Justice may eventually finalize their proposed regulation, the issue is whether the proposed regulation will actually accomplish its stated intention. The committee has concluded that none of the proposed options would close the partnership loophole in a satisfactory manner.

The five options proposed by the FTC in its advance notice of proposed rulemaking are:

(1) change the "flow-through rule" to create an obligation for newly formed entities, including partnerships, that would otherwise not meet the size-of-person test to file;

(2) define each general or managing partner as controlling the partnership;

(3) lower the test for control to some level below 50 percent;

(4) expand definition of "entity" to include a broader "group" whereby a partnership would be viewed as a group controlled by some or all of its members; or

(5) employ an "acquisition vehicle" rule that would obligate a partnership to file notice whether it acquired stock directly or indirectly through use of a partnership.

It is not clear that any of the above proposals would result in notification to the Government, even in situations which would clearly present potential anticompetitive effects. S. 995 is most similar to option two presented by the FTC. According to the FTC, this approach is compatible with the allocation of business risks engendered in partnerships.

> Deeming each general partner to control the partnership would be consistent with the power of general partners under common law. It would also assure that any party with potential control over a partnership would have to report any acquisition (that otherwise meets the statutory requirements) made by that partnership.

54 Fed. Reg. 7963 (Feb. 24, 1989).

Under S. 995, it is intended that some party—either because it has a controlling interest or participates in the management of the partnership as a general partner—is obligated to file if the partnership itself does not have assets sufficient to meet the so-called "size-of-person" test.

Under S. 995, the annual net sales and total assets of a partnership will be deemed to be the greatest of the annual net sales and total assets of:

(1) the partnership;

(2) any general partner;

(3) any partner having the right to 50 per centum or more of the profits of the partnership; or

(4) any partner having the right in the event of dissolution to 50 per centum or more of the assets of the partnership.

The result of this language is that a partnership may be required to file if the partnership itself meets the size-of-person test, if any

general partner meets the size-of-person test, or if any partner holding a controlling interest meets the size-of-person test.

2. Waiting period extensions

After submitting the necessary premerger information to the enforcement agencies, section 7A currently requires that the parties wait 30 days, or 15 days in the case of a cash tender offer, before consummating the merger. If the enforcement agencies determine that the merger would not violate the antitrust laws, they may advise the parties at any time after the premerger filing is made that the transaction may be completed. If, however, the enforcement agencies need more information about the transaction before they can assess its competitive implications, they may request such information from the merging parties. The enforcement agencies must make any request for additional information within the initial waiting period. As soon as all the requested information is submitted to the enforcement agencies, the parties must wait an additional 20 days, or 10 days in the case of a cash tender offer, before consummating the merger. The parties are free to complete the transaction after the expiration of this second waiting period unless the enforcement agencies have sued to enjoin the merger's consummation.

At the time that Hart-Scott-Rodino legislation was originally considered, some legislators were concerned that the premerger waiting period could, if unduly long, inappropriately discourage cash tender offers. Cash tender offers can be a procompetitive influence by encouraging incumbent management to be responsible to shareholder interests. This committee agrees that cash tender offers may enhance competition and management efficiency and should not be unduly constrained. At the same time, however, the antitrust enforcement agencies must be afforded adequate time to review the effects of a proposed cash tender offer on competition.

The securities laws regarding cash tender offers have changed substantially, however, between 1976 and the present. At the time Hart-Scott-Rodino was enacted, the Williams Act required that a cash tender offer remain open for 10 days, or 7 days if the offer was for "any and all shares." In that context, section 7A, as originally enacted, provided a waiting period for cash tender offers that was more than two times as long as the Williams Act's minimum offering period—an initial period of 15 days plus a discretionary 10-day extension. Today, the Williams Act requires that cash tender offers remain open for 20 business days, roughly 26 to 28 calendar days. The 15 day/10 day antitrust waiting periods under section 7A, however, have never been updated.

The structure of a proposed merger, as a cash tender offer or otherwise, has nothing to do with its probable effect on competition. Nevertheless, the Federal antitrust enforcement agencies may only have a maximum time of 25 days to analyze a complex cash tender offer. The merger of Socal and Gulf, for example, was valued at $13.3 billion and was structured as a cash tender offer. The Federal Trade Commission received about 1,200 boxes of documents, or about 1 million pieces of paper, in response to its request for more information. Under section 7A, the FTC staff had only 10 days to review these documents, determine whether or not the merger vio-

lated the antitrust laws, prepare a case to enjoin completion of the merger, and give the Commissioners enough time to review its recommendation. These tasks are far too important and complex to complete in only 10 calendar days.

S. 995 extends the 25-day waiting period (15 days plus 10 days) for cash tender offers to 40 days (20 days plus 20 days). These extensions of the waiting periods are designed to give the enforcement agencies more time to review proposed mergers but to avoid undue interference with cash tender offers.[2]

S. 995 also provides additional time for the review of complex mergers or mergers requiring the analysis of extensive amounts of information or documentary material, no matter how the deal may be structured. Should the Department of Justice or the Federal Trade Commission "reasonably require" additional time to analyze such a merger, the court shall provide the enforcement agencies with a third waiting period of up to 25 days. The provision does not allow the court to provide an automatic extension of time to the enforcement agencies. On the other hand, the agencies need not show a likelihood that the merger would violate the antitrust laws—a showing which would be required to enjoin the acquisition. Instead, the court must determine that the request for more time is a reasonable prerequisite for a thorough and complete antitrust analysis. The court could, for example, grant an extension of time based on the scope of the proposed merger, the number, size, or complexity of markets involved in the proposed transaction, the number of documents the agency needs to review in its analysis, the complexity of the antitrust analysis, or the extent of the agency's investigation into the competitive effects of the proposed transaction.

The additional 25-day waiting period is intended to ensure that the enforcement agencies have enough time to conduct a complete analysis of the antitrust issues raised by the proposed transaction. The committee intends this phrase to mean that the enforcement agencies must demonstrate that additional time is required for a thorough antitrust review, not simply that they desire additional time.

3. Civil penalties

Currently, parties found to have violated the premerger notification requirements of section 7A are subject to maximum penalities of $10,000 for each day of violation. In practice, however, courts have never assessed the maximum fine. Moreover, these cases frequently take years to resolve, so that violators have tended to view the likelihood and delay in paying fines as very small in comparison to the enormous profits to be gained from not filing notice. The committee considers this lax treatment of investors who thwart the

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[2] It is notable, however, that the directorate of economic policy and analysis of the Securities and Exchange Commission reports that there were 197 tender offers in 1986, 136 of which were treated as friendly by the target management, 51 of which were treated as hostile by the target management, and 10 of which were treated as neither friendly nor hostile. In addition, the Department of Justice and the Federal Trade Commission sought additional information about proposed mergers only 4.1 percent of the time in fiscal year 1986. The extension of time to review cash tender offers would have applied to only about two hostile takeovers in 1986 and can be expected to effect only about a handful of hostile takeovers annually after enactment.

notification requirements of Hart-Scott-Rodino to be a serious threat to the efficacy of the premerger review program.

A second concern has been the timeliness of prosecuting reporting violations under the Clayton Act. Currently, the FTC does not have the authority to seek civil penalties on its own for violations of the reporting requirements of Hart-Scott-Rodino, even though the FTC has the obligation to administer the reporting program, in consultation with the Department of Justice. Thus, once the FTC has determined that it has a reason to believe that a violation of the reporting requirements has occurred, it must forward a recommendation to the Department of Justice that an action be brought by the Department in Federal court to seek civil penalties. In cases where the Department is in concurrence that a violation may have occurred, this additional review by the Department is costly and time consuming for both the Government and for the potential defendant. Given the FTC's somewhat unique obligation to administer the reporting program, the committee believes that the FTC should have the authority to enforce the statute and its rules once the department concurs in the conclusion.

The amendments contained in S. 995 create a strong deterrence to reporting violations. First, by increasing the maximum daily penalty to $100,000, it will send a signal to persons considering acquisitions that Congress considers the obligation to notify the antitrust agencies in advance of purchasing stock to be very grave, and violations to be very serious. Second, by enabling the FTC to sue on its own behalf in these cases after 45-day notice to the Department of Justice, S. 995 streamlines the prosecution of reporting violations and conserves limited antitrust enforcement resources. This should result in more timely resolution of these cases, and thus reduce the present value of making stock purchases without giving notice to the target as required under the Clayton Act.

IV. Vote of the Committee

On March 22, 1990, with a quorum present, by voice vote, the Committee on the Judiciary ordered S. 995, as amended, favorably reported.

V. Text of S. 995 as Amended

[101st Cong., 1st Sess.]

A BILL To amend the Clayton and Sherman Acts regarding antitrust procedures

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Antitrust Procedures Improvement Act of 1989".

CRIMINAL FINES

Sec. 2. Section 1 of the Sherman Act (15 U.S.C. 1) is amended by—

(a) striking out "one million" and inserting in lieu thereof "ten million"; and

(b) striking out "one hundred" and inserting in lieu thereof "two hundred-fifty".

HART-SCOTT-RODINO ACT AMENDMENTS

SEC. 3. (a) Section 7A(a) of the Clayton Act is amended by adding at the end thereof the following new subsection:

"(4) For purposes of this section, in the case of a partnership, annual net sales and total assets of the partnership shall be based upon the greatest of the annual net sales or total assets of: (1) the partnership, (2) any general partner, (3) any partner having the right to 50 per centum or more of the profits of the partnership, or (4) any partner having the right in the event of dissolution to 50 per centum or more of the assets of the partnership.".

(b) Section 7A(e) of the Clayton Act is amended—

(1) by substituting "20-day" for "15-day" each place it appears;

(2) in paragraph (2) by striking out "(or in the case of a cash tender offer, 10 days)"; and

(3) by striking out "only" from the last sentence of paragraph (2) and inserting at the end thereof the following: "or (g)(3)".

(c) Section 7A(g) of the Clayton Act is amended—

(1) in paragraph (1), by striking out "$10,000" and inserting "$100,000" in lieu thereof; and by inserting the following at the end thereof: ", or by the Federal Trade Commission in accordance with the notice requirements of Section 16(a) of the Federal Trade Commission Act, 15 U.S.C. Section 56(a), unless the Attorney General in his or her discretion determines during the 45 day period applicable under Section 16(a) that such action would be inconsistent with the enforcement policies of the United States; provided that the Attorney General may in his or her discretion authorize the Federal Trade Commission to commence such action prior to the expiration of such 45 day period."; and

(2) by adding the following at the end thereof: "(3) The court may extend the additional period for up to 25 days if, due to the complexity or scope of the information or documentary material to be evaluated, the Federal Trade Commission or the Assistant Attorney General reasonably requires such additional time to determine whether the proposed acquisition may, if consummated, violate the antitrust laws."

(d) This subsection and the amendments made by this subsection shall become effective 120 days after the date of enactment of this section.

VI. SECTION-BY-SECTION ANALYSIS

Section 1: Section 1 states the short title of this legislation: the "Antitrust Procedures Improvement Act of 1989."

Section 2: Section 2 increases the criminal fines for violations of section 1 of the Sherman Act. The maximum fines are increased from $1 million to $10 million for corporations and from $100,000 to $240,000 for individuals.

Section 3: Section 3(a) would amend the Clayton Act to require that the assets and sales of controlling partners and general partners be included in determining the size of a partnership. Thus, the annual net sales and total assets of the partnership shall be based

on the greatest of the annual net sales or total assets of: (1) the partnership, (2) any general partner, (3) any partner having the right to 50 per centum or more of the profits of the partnership, or (4) any partner having the right in the event of dissolution to 50 per centum or more of the assets of the partnership.

One factor which the enforcement agencies should use as a guide to determining whether a person is a "general partner" is the definition of a "general partner" under State law. Beyond this, the committee has decided not to define the "general partner," although it is contemplated that general partners would have some ability to participate in the management or strategic direction of the partnership. Instead, the U.S. Department of Justice and the FTC may define it further, if necessary, in accordance with section 7A(d).

This will provide the antitrust agencies with flexibility in enforcing the new provision. So, for example, if the agencies find that parties to acquisitions without antitrust significance must report under the new provision, the agencies may exclude those transactions from the reporting requirements of the act.

The bill does not address who is obligated to notify the Federal enforcement agencies about the proposed merger or the form of notification. The committee leaves these determinations of, for example, who should file (the partnership, the partner, or both) and how many filings must be submitted, to the U.S. Department of Justice and the FTC.

The bill is not meant to preclude the Federal enforcement agencies from promulgating regulations under section 7A(d) which establish additional reporting requirements for partnerships involved in proposed mergers. The bill sets only the minimum standards for premerger reporting by partnerships. The agencies are free to promulgate regulations implementing the bill and further defining terms in the bill, if necessary. In addition, as stated above, the enforcement agencies may determine that partnerships must report proposed mergers in circumstances not covered by the bill and promulgate regulations to that effect.

Section 3(b) lengthens the waiting period for mergers structured as cash tender offers. Currently, the parties in a cash tender offer must initially wait 15 days before completion and, if the Government requests more information about the transaction, an additional 10 days. Section 3(b) increases both these periods to 20 days.

Section 3(b) also amends section 7A to allow a court to grant a third waiting period for larger or more complex mergers. The new provision allows the Federal antitrust enforcement agencies to seek up to 25 more days to analyze a merger if either agency reasonably requires the additional time due to the complexity or scope of the information or documentary material to be evaluated.

Section 3(c) amends section 7A(g) of the Clayton Act by increasing the daily penalty applicable to violations of the premerger notification and reporting requirements contained in the Clayton Act from $10,000 to $100,000. In addition, this section would authorize the FTC to sue in Federal court on its own behalf to enforce the notification requirements of the Clayton Act, if 45 days after giving notice to the Attorney General, the Attorney General has not de-

termined that such action would be inconsistent with the enforcement policies of the United States.

Section 3(d) provides that the act becomes effective 120 days after enactment. Thus, the act applies to all proposed mergers to be consummated 120 days after enactment.

VII. Estimated Cost of Legislation

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the committee provides the following cost estimate, prepared by the Congressional Budget Office:

U.S. Congress,
Congressional Budget Office,
Washington, DC, March 29, 1990.

Hon. Joseph R. Biden, Jr.,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has reviewed S. 995, the Antitrust Procedures Improvement Act of 1989, as ordered reported by the Senate Committee on the Judiciary, March 22, 1990. We estimate that no cost to the federal government or to state or local governments would result from enactment of this bill. While this bill could result in increased receipts to the federal government, CBO has no basis for predicting the amount of any such increased receipts.

S. 995 would increase the maximum corporate fine that may be imposed for certain criminal violations of the Sherman Act. The bill would also increase civil penalties for violations of the Hart-Scott-Rodino premerger notification requirements, and would make other minor changes to the Hart-Scott-Rodino premerger notification regulations.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mitchell Rosenfeld, who can be reached at 226-2860.

Sincerely,

Robert F. Hale,
(For Robert D. Reischauer.)

VIII. Regulatory Impact Statement

Pursuant to paragraph 11(b), rule XXVI of the Standing Rules of the Senate, the committee has concluded that the act establishes now new regulatory scheme and, therefore, will have no adverse impact.

IX. Changes in Existing Law

In compliance with paragraph 12 of the rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 995, as reported, are shown as follows (new matter is printed in italic, existing law in which no change is proposed is shown in roman);

UNITED STATES CODE

* * * * * * *

TITLE 15—COMMERCE AND TRADE

CHAPTER 1—MONOPOLIES AND COMBINATIONS IN RESTRAINT OF TRADE

* * * * * * *

SHERMAN ACT

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding [one million dollars] *$10,000,000* if a corporation, or, if any other person, [one hundred thousand dollars,] *$250,000,* or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

* * * * * * *

§ 18a. Premerger notification and waiting period

(a) FILING.—Except as exempted pursuant to subsection (c) of this section, no person shall acquire, directly or indirectly, any voting securities or assets of any other person, unless both persons (or in the case of a tender offer, the acquiring person) file notification pursuant to rules under subsection (d)(1) of this section and the waiting period described in subsection (b)(1) of this section has expired, if—

(1) the acquiring person, or the person whose voting securities or assets are being acquired, is engaged in commerce or in any activity affecting commerce;

* * * * * * *

(3) as a result of such acquisition, the acquiring person would hold—

(A) 15 per centum or more of the voting securities or assets of the acquired person, or

(B) an aggregate total amount of the voting securities and assets of the acquired person in excess of $15,000,000.

(4) For the purposes of this section, in the case of a partnership, annual net sales and total assets of the partnership shall be based upon the greatest of the annual net sales or total assets of: (1) the partnership, (2) any general partner, (3) any partner having the right to 50 per centum or more of the profits of the partnership, or (4) any partner having the right in the event of dissolution to 50 per centum or more of the assets of the partnership.

In the case of a tender offer, the person whose voting securities are sought to be acquired by a person required to file notification under this subsection shall file notification pursuant to rules under subsection (d) of this section.

(b) WAITING PERIOD; PUBLICATION; VOTING SECURITIES.—(1) The waiting period required under subsection (a) of this section shall—

* * * * * * *

(B) end on the thirtieth day after the date of such receipt (or in the case of a cash tender offer, the [fifteenth] *twentieth* day), or on such later date as may be set under subsection (e)(2) [or (g) (2)], *(g)(2) or (g)(3)* of this section.

* * * * * * *

(e) ADDITIONAL INFORMATION; WAITING PERIOD EXTENSIONS.—(1) The Federal Trade Commission or the Assistant Attorney General may, prior to the expiration of the 30-day waiting period (or in the case of a cash tender offer, the [15-day] *20-day* waiting period) specified in subsection (b)(1) of this section, require the submission of additional information or documentary material relevant to the proposed acquisition, from a person required to file notification with respect to such acquisition under subsection (a) of this section prior to the expiration of the waiting period specified in subsection (b)(1) of this section, or from any officer, director, partner, agent, or employee of such person.

(2) The Federal Trade Commission or the Assistant Attorney General, in its or his discretion, may extend the 30-day waiting period (or in the case of a cash tender offer, the [15-day] *20-day* waiting period) specified in subsection (b)(1) of this section for an additional period of not more than 20 days [or in the case of a cash tender offer, 10 days] after the date on which the Federal Trade Commission or the Assistant Attorney General, as the case may be, receives from any person to whom a request is made under paragraph (1), or in the case of tender offers, the acquiring person, (A) all the information and documentary material required to be submitted pursuant to such a request, or (B) if such request is not fully complied with, the information and documentary material submitted and a statement of the reasons for such noncompliance. Such additional period may be further extended [only] by the United States district court, upon an application by the Federal Trade Commission or the Assistant Attorney General pursuant to subsection (g)(2) *or (g)(3)* of this section.

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(g) CIVIL PENALTY; COMPLIANCE; POWER OF COURT.—(1) Any person, or any officer, director, or partner thereof, who wails to coply with any provision of this section shall be liable to the United States for a civil penalty of not more than [$10,000] *$100,000* for each day during which such person is in violation of this section. Such penalty may be recovered in a civil action brought by the United States[.], *or by the Federal Trade Commission in accordance with the notice requirements of Section 16(a) of the Federal Trade Commission Act, 15 U.S.C. Section 56(a), unless the Attorney General in his or her discretion determines during the 45 day period applicable under Section 16(a) that such action would*

be inconsistent with the enforcement policies of the United States; provided that the Attorney General may in his or her discretion authorize such action prior to the expiration of such 45 day period.

(2) If any person, or any officer, director, partner, agent, or employee thereof, fails substantially to comply with the notification requirement under subsection (A) of this section or any request for the submission of additional information or documentary material under subsection (e)(1) of this section within the waiting period specified in subsection (b)(1) of this section and as may be extended under subsection (e)(2) of this section, the United States district court—

(A) may order compliance;

(B) shall extend the waiting period specified in subsection (b)(1) of this section and as may have been extended under subsection (e)(2) of this section until there has been substantial compliance, except that, in the case of a tender offer, the court may not extend such waiting period on the basis of a failure, by the person whose stock is sought to be acquired, to comply substantially with such notification requirement or any such request; and

(C) may grant such other equitable relief as the court in its discretion determines necessary or appropriate,

upon application of the Federal Trade Commission or the Assistant Attorney General.

(3) The court may extend the additional period for up to 25 days if, due to the complexity or scope of the information or documentary material to be evaluated, the Federal Trade Commission or the Assistant Attorney General reasonably requires such additional time to determine whether the proposed acquisition may, if consummated, violate the antitrust laws.

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